

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has established that he sustained the conditions of heavy metal toxicity, rectal carcinoma, aphasia, depression, and loss of speech causally related to exposure to heavy metals during the course of his federal employment; and (2) whether he has established hearing loss due to noise exposure at work.

FACTUAL HISTORY

On July 10, 2014 appellant, then a 79-year-old retired toolmaker, filed an occupational disease claim (Form CA-2) alleging that he sustained heavy metal toxicity, rectal carcinoma, speech problems, depression, hearing loss, and aphasia as a result of “prolonged daily exposure to metal dust [and] grinding as a tool [and] disc worker” and exposure to noise. He advised that he first became aware of the relationship between his condition and work factors on October 2, 2013. Appellant retired on June 1, 1987. The form indicated that his spouse and children were completing the necessary forms and statements in support of the claim due to his severe difficulty communicating.

In a statement accompanying the claim, one of appellant’s children described in detail her father’s exposure to heavy metals shaping grinding wheels. She advised that her father related that the dust was “so bad he tried to hold his breath as long as he could....” Employees did not use respiratory protection during that time. Appellant’s daughter related:

“It is my understanding that many of the different rocks were bonded together with harmful things such as lead and aluminum oxide, and many of the tools they ground, such as the tungsten carbide, produced exposure to cobalt and cadmium, not to mention that at the center of the grinding wheel there was a lead bearing, which they would put their finger in and spin as they tapped it on the grinding rock.”

Appellant’s daughter advised that, at age 60, appellant underwent a colostomy to treat rectal carcinoma. She asserted:

“When he was told he had rectal cancer, we never thought there may be a connection from work that may have contributed to this condition, such as lead poisoning as well as other heavy metals which are known to cause rectal cancer. To date, the buildings and shops listed above where my [father] worked have been torn down and are under study for biological hazard and contaminants.”

Appellant’s daughter maintained that he experienced depression due to his rectal carcinoma. Beginning six years ago, he experienced speech difficulties, an irregular heartbeat, and shortness of breath. Providers initially believed that appellant may have had a stroke. A speech therapist, however, advised that it might be work related and recommended testing for heavy metals. Blood tests revealed 14 heavy metals including “off the chart” levels of lead. Appellant’s daughter related, “Finally we started getting some answers to what has been a long journey to understanding what has caused many of his problems.”

In a report dated October 2, 2013, Dr. Tracey E. Pinkston, a Board-certified internist, diagnosed a progressive neurological disorder causing expressive aphasia such that appellant could not speak, write, or spell. She related that physicians performed comprehensive testing, but could not find the cause of his condition. Dr. Pinkston noted that appellant ground down heavy metals, including lead and aluminum, without a mask or respirator in his work for the employing establishment. She related:

“Upon evaluation, [appellant] was found to have extremely high levels of lead (levels as high as 5 in blood) and aluminum (levels as high as 345 in urine). He was treated with chelation therapy for this heavy metal toxicity and had only slight improvements, probably because the neurological pathology was so advanced. The heavy metal toxicity from his work as metal work for [the employing establishment] is almost certainly the cause of his progressive neurologic speech disorder and aphasia”

By letter dated July 28, 2014, OWCP requested that the employing establishment address the accuracy of appellant’s allegations. It further asked that it provide his medical records and describe his work duties, exposure history, and any precautions taken to reduce exposure. In another letter of the same date, OWCP requested additional factual and medical information from appellant.

Appellant submitted literature regarding health problems created by using carbide tips. He also submitted results from February 28, 2014 audiometric testing, records relevant to his rectal carcinoma in 1993, and citations to studies showing a link between metal exposure and rectal cancer.

In a May 1, 2012 report, received by OWCP on October 7, 2014, Dr. Pinkston noted that appellant had a history of exposure to heavy metals at work. She discussed his symptoms of increasing loss of speech and test results showing that his “aluminum level was impressively elevated, as was his blood lead level.” Dr. Pinkston recommended chelation therapy. She advised that it was not certain that “heavy metal toxicity is the only cause of his speech loss” or that the treatment would help his symptoms.

A May 9, 2012 urinalysis revealed high levels of aluminum, barium, mercury, tin, lead, and uranium. The results indicated that lead levels were more than three times the “upper expected limit” and that the mercury level “far exceeds the expected level for the general population.” Appellant also had significantly higher than usual levels of uranium. A September 26, 2013 urinalysis showed reduced levels of heavy metals, particularly aluminum and lead.

In March and April 2014 progress reports, Dr. Pinkston described appellant’s treatment with chelation therapy. In an April 7, 2014 report, she noted that he was almost unable to speak at all. Dr. Pinkston diagnosed primary progressive aphasia and related that appellant “wants to pursue a workers comp[ensation-]type claim on the basis that the heavy metal toxicity may have caused it.” She advised that colon cancer was also “associated with heavy metal toxicity.” Dr. Pinkston diagnosed the toxic effect of other lead compounds and contact and exposure to other hazardous metals.

On May 19, 2014 appellant requested a copy of his medical records from the employing establishment.

An OWCP medical adviser reviewed the evidence on November 18, 2014. He noted that a March 27, 2010 audiogram revealed bilateral sensorineural hearing loss consistent with noise exposure, but he did not have audiograms or other medical evidence from the employing establishment. The medical adviser advised that appellant's rectal carcinoma was unrelated to employment but that his neurological problem might be due to heavy metal exposure. He recommended a second opinion examination to determine if he had a neurological disease as the result of exposure to heavy metals at work.

OWCP, on December 16, 2014, requested that appellant submit evidence showing that he timely filed his claim for compensation.

By decision dated January 12, 2015, OWCP denied appellant's occupational disease claim, finding that his claim was untimely filed under 5 U.S.C. § 8122. It determined that there was no evidence that he filed his claim within three years of the injury date or that his supervisor had actual knowledge of his injury within 30 days.

Appellant, on January 16, 2015, requested a telephone hearing before an OWCP hearing representative.

In a letter dated June 17, 2015, an individual related that appellant's speech loss began in 2007 and that physicians believed that it was caused by a stroke; however, his speech difficulties progressively increased and in 2012 he obtained treatment from Kathleen Smead, a speech language pathologist.³ Ms. Smead for the first time "suggested that it was not stroke related, because a stroke would have caused immediate damage, and his speech loss progressed over a period of years." She recommended an evaluation with Dr. Pinkston who, on May 1, 2012, diagnosed heavy metal exposure due to his employment.

Appellant submitted a January 11, 2012 report from Ms. Smead. The speech therapist advised that it was unclear whether appellant was "experiencing multiple small lesions or whether other factors, such as his history of high fever with convulsions and exposure to heavy metals as part of his occupational history, were playing a part."

In a report dated December 22, 2014, received by OWCP on July 17, 2015, Dr. Pinkston diagnosed benign essential hypertension, other speech disturbance, aphasia, the toxic effect of other lead compounds, and unspecified hearing loss.

At the telephone hearing, held on June 30, 2015, appellant's daughter related that appellant was diagnosed with colon cancer 25 years ago and speech loss beginning in 2007. She had obtained a power of attorney for her father three or four years earlier. The daughter related that he and the family first became aware of the possible relationship between employment and his condition in 2012 after he sought treatment with a speech therapist. In May 2012 Dr. Pinkston diagnosed exposure to heavy metal toxins due to his work. Appellant's son

³ The statement is not signed and the author is not otherwise identified.

described the metals that he was exposed to in his work as a tool and die maker, including aluminum, beryllium, and tungsten carbide. He related that Dr. Pinkston advised that the metal accumulated in his bones. Appellant's son noted that the employing establishment now undertook multiple precautions to prevent workers from inhaling the dust, including the use of special suits, solvents, and an air filtration system. He noted that the building where appellant worked was currently listed as a contaminated site.

Following the hearing, appellant submitted a July 28, 2015 audiogram and blood test results.

By decision dated September 9, 2015, an OWCP hearing representative set aside the January 12, 2015 decision. She found that the evidence supported that appellant should have been aware of the possible relationship between his conditions and claimed work factors on January 11, 2012, the date of the report from the speech pathologist. Appellant filed his claim on April 14, 2014, within the three-year time period. The hearing representative thus determined that appellant timely filed his claim for compensation. She further found that the medical evidence of record was sufficient to warrant further development. The hearing representative instructed OWCP to obtain from the employing establishment a list of the metals to which appellant had been exposed to at work and refer him for a second opinion examination to determine whether such exposure caused or aggravated a diagnosed condition.

OWCP, in letters dated October 2 and November 9, 2015, requested that the employing establishment describe appellant's metal exposure during the course of his employment.

Appellant provided a list of metals to which he had been exposed at work, including aluminum, chromoly, brass, carbide cobalt, aluminum oxide, stainless steel, cadmium, nickel, chrome, black oxide coating, silver carbon inserts, high speed steel, tungsten carbide, cobalt, barium, tin, and stellite.

In a report dated September 29, 2015, Dr. Ward Dean, an internist, discussed appellant's history of working for almost 40 years as a tool and die maker with exposure to "high concentrations of metal particles and vapors, including lead, mercury, and aluminum." At that time employees did not use any protection and the area was not ventilated. Dr. Dean described appellant's history of aphasia and the 2012 postchelation urinalysis finding "*extremely* high levels of lead, with above-normal levels of mercury and aluminum." (Emphasis in the original.) He noted that chelation improved his headaches and his performance of some activities of daily living. Dr. Dean advised that repeated blood tests showed that appellant's lead levels decreased with therapy, but subsequently rose. He related, "The waxing and waning of [his] blood lead levels before and after each series of chelations is consistent with a significant heavy metal burden in his body due to his many years of exposure as a tool and die maker." Dr. Dean recommended continued chelation infusions.

OWCP prepared a statement of accepted facts noting his exposure to the metals appellant had listed in his statement. It referred him to Dr. Terry W. Taylor, who specializes in occupational medicine, for a second opinion examination.

In a report dated March 16, 2016, Dr. Taylor reviewed the statement of accepted facts and appellant's history of a neurological disorder with severe expressive aphasia. He noted that evaluations eliminated a stroke as the cause of his condition. Dr. Taylor diagnosed hypertension, elevated cholesterol, aphasia, anxiety with depression, bilateral hearing loss, and rectal carcinoma. He asserted that the diagnosed conditions were unrelated to exposure to heavy metals during the course of appellant's employment. Dr. Taylor found that appellant was unable to perform his usual employment due to his hearing loss and inability to communicate but that the conditions were not related to his work.

By decision dated August 11, 2016, OWCP denied appellant's claim as the medical evidence failed to establish a diagnosed condition causally related to the identified work factors. It found that Dr. Taylor's opinion represented the weight of the medical evidence.

On appeal counsel argues that Dr. Dean evidenced knowledge of appellant's work duties, addressed the objective findings of high lead, mercury, and aluminum in his system, and explained why the lead levels in his blood waxed and waned with chelation treatment. He notes that Dr. Dean and Dr. Pinkston both found that his work duties caused heavy metal toxicity. Counsel maintains that Dr. Taylor did not provide sufficient rationale for his opinion and thus it is of little probative value.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;⁶ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁷ and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁸

⁴ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁷ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁸ *Beverly A. Spencer*, 55 ECAB 501 (2004).

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,⁹ must be one of reasonable medical certainty¹⁰ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹² While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹³ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁴ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁵

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained heavy metal toxicity, rectal carcinoma, aphasia, depression, and loss of speech due to exposure to a range of chemicals in his work as a tool and die worker. OWCP initially denied the claim as untimely. However, a hearing representative properly determined that the claim was timely filed as the first evidence attributing a condition to possible toxic metal exposure occurred in 2012 and he filed his claim in 2014, within the three-year time period.¹⁶

OWCP accepted that appellant was exposed to a range of heavy metals during the course of his employment. The issue, therefore, is whether the medical evidence established a causal relationship between the claimed conditions and the identified employment factors.

On October 2, 2013 Dr. Pinkston diagnosed a progressive neurological disorder resulting in aphasia causing appellant to be unable to speak or write. She reviewed his history of grinding heavy metals without respiratory protection. Dr. Pinkston advised that testing showed exceedingly high levels of lead and aluminum in appellant's system. She opined that heavy metal toxicity from working with metal was "almost certainly" the cause of his aphasia. In a report dated April 7, 2014, Dr. Pinkston diagnosed the toxic effect of other lead compounds and

⁹ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹⁰ *John W. Montoya*, 54 ECAB 306 (2003).

¹¹ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹² *Vanessa Young*, 55 ECAB 575 (2004).

¹³ *See S.J.*, Docket No. 15-0029 (issued September 15, 2016); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁴ *Melvin James*, 55 ECAB 406 (2004).

¹⁵ 20 C.F.R. § 10.121.

¹⁶ Section 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware or by the exercise of reasonable diligence should have been aware of the causal relationship between the employment and the compensable disability. 5 U.S.C. § 8122(b).

exposure to other hazardous metals. She noted that heavy metal toxicity was also linked with colon cancer.

In a report dated September 26, 2015, Dr. Dunn discussed appellant's history of exposure to heavy metals including aluminum, lead, and mercury during his 40 years working as a tool and die maker in an unventilated area without protection. He noted that his lead levels decreased with chelation therapy but subsequently increased, which he indicated revealed a "significant heavy metal burden in his body due to his many years of exposure as a tool and die maker."

OWCP referred appellant to Dr. Taylor for a second opinion examination. On March 16, 2016 Dr. Taylor noted that appellant had a history of severe expressive aphasia from a neurological disorder and that medical tests had ruled out a stroke as the cause of his condition. He diagnosed hypertension, elevated cholesterol, aphasia, anxiety with depression, bilateral hearing loss, and rectal carcinoma unrelated to exposure to heavy metals at work. Dr. Taylor advised that appellant was unable to work due to communication issues and hearing loss.

Based on Dr. Taylor's second opinion report, OWCP found that appellant failed to meet his burden of proof to establish a medical condition due to exposure to heavy metals. The Board finds, however, that the report of Dr. Taylor is insufficiently rationalized to constitute the weight of the evidence. Dr. Taylor provided conclusory answers to the questions posed by OWCP without any narrative explanation. He did not explain the effect of the objective testing showing the presence of heavy metals in appellant's blood and urine or provide any rationale for his finding that the diagnosed conditions were unrelated to employment. The Board has held that medical conclusions unsupported by rationale are of little probative value.¹⁷ The certainty with which Dr. Taylor expressed his opinion cannot overcome the lack of medical rationale explaining the basis of that opinion.¹⁸ It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done. As OWCP undertook development of the evidence by referring appellant to a second opinion physician, it has the duty to secure an appropriate report addressing the relevant issues.¹⁹

The Board, therefore, will remand the case for OWCP to obtain a supplemental report from Dr. Taylor addressing whether the diagnosed conditions were caused or aggravated by appellant's exposure to heavy metals in the course of his federal employment with supporting rationale. After this and any further development deemed necessary, it should issue a *de novo* decision.

¹⁷ G.W., Docket No. 15-1646 (issued September 1, 2016); R.C., 58 ECAB 238 (2006).

¹⁸ See G.W., *id.*; S.T., Docket No. 13-1079 (issued September 18, 2014).

¹⁹ Peter C. Belkind, 56 ECAB 580 (2005).

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged, and that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.⁹ Neither the fact that the condition became apparent during a period of employment, nor the belief of the employee that the alleged hearing loss was causally related to noise exposure in federal employment, is sufficient to establish causal relationship.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP did not properly adjudicate appellant's claim for noise exposure due to hearing loss. He alleged that he sustained hearing loss as a result of noise exposure while working as a tool and die operator. Appellant submitted audiograms in support of his claim. On November 18, 2014 an OWCP medical adviser noted that a March 27, 2010 audiogram showed bilateral sensorineural hearing loss consistent with noise exposure. He noted that he did not have audiograms from the employing establishment.

OWCP, in its August 11, 2016 decision, noted that Dr. Taylor found that appellant's hearing loss was unrelated to his employment. It did not, however, separate his claim for hearing loss as a result of noise exposure from his claim for conditions arising as a result of exposure to heavy metals. On remand, OWCP should obtain audiograms and noise exposure information from the employing establishment relevant to appellant's claim for noise-induced hearing loss.²⁰ It should then determine whether appellant timely filed his claim for hearing loss.²¹ If so, it should consider the medical evidence he submitted and, if it does not meet all its requirements for adjudication, refer him for an examination by a Board-certified otolaryngologist in accordance with its procedures.²²

²⁰ See *N.S.*, 59 ECAB 422 (2008) (OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source).

²¹ See 5 U.S.C. § 8122. The Board has held that the issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim. *Charles Walker*, 55 ECAB 238 (2004). If the employing establishment, in connection with a recognized environmental hazard, has an employee testing program and a test shows the employee to have positive findings this should be accepted as constituting actual knowledge. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3a(3)(c) (March 1993).

²² Federal (FECA) Procedure Manual, *id.* at Chapter 2.800.9(a)(1) (June 2011); see also *D.S.*, Docket No. 16-0903 (issued September 8, 2016).

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has established that he sustained the conditions of heavy metal toxicity, rectal carcinoma, aphasia, depression, and loss of speech causally related to exposure to heavy metals during the course of his federal employment. The Board further finds that the case is not in posture for decision regarding whether he sustained hearing loss due to noise exposure in the course of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 14, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board